IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11145 of 1998

with

SPECIAL CIVIL APPLICATION No 11152 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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HASMUKHLAL THAKORDAS DALWALA

Versus

COMMISSIONER OF INCOME TAX

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Appearance:

MR JP SHAH with Mr M.J.Shah for Petitioners

MR MIHIR JOSHI WITH MR MANISH R BHATT for Respondents.

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CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.R.DAVE

Date of decision: 24/03/99

ORAL JUDGEMENT(Per J.N.Bhatt, J.)

Since both these petitions under Article 226 of the Constitution of India raise identical questions, upon request, they are being adjudicated upon, simultaneously.

The sole question which has come to the surface in this two petitions is the impugned action of the Commissioner of Income-tax, Surat, in directing the petitioners to withdraw the applications pending before the Settlement Commissioner as a condition precedent for availing the benefits of Kar Vivad Samadhan Scheme 1998 (KVS Scheme). In order to examine and appreciate this question, we would like to highlight a few skeleton factual aspects leading to the rise of this group of two petitions under Article 226 of the Constitution of India.

The petitioners are income-tax assessees. The income tax assessment years involved are 1987-88, 1988-89 and 1989-90. Respondent No.1, Commissioner of Income-tax, Surat, before whom the petitioners are entitled to present declaration under KVS Scheme, made declarations by both the petitioners. However, respondent No.1 took the view that the applications of the assessees against the assessments for the aforesaid assessment years are admitted under section 245D(1) of the Income-tax Act, 1961, and since no order has been passed under sub-section (4) thereof, the petitioner would be entitled to the benefit of KVS scheme, only, upon the withdrawal of the applications pending, before the Settlement Commission.

As a sequel to that, the petitioners sought the withdrawal of the applications from respondent No.2, Settlement Commission. However, respondent No.2, Settlement Commission did not permit the petitioners to withdraw the settlement applications, as a result of which, the declarations submitted by the petitioners for availing the benefit of KVS-Scheme, could not be processed further by the respondent No.1. That is how the petitioners have come up before this Court by filing two writ petitions invoking the aids of the provisions of Article 226 of the Constitution of India.

Affidavit in reply is filed on behalf of respondent No.1 only, wherein, the facts stated in the petitions are not traversed. In the circumstances, the only question which requires to be adjudicated upon, at this juncture, is as to whether the respondent No.1 is justified in not processing the declarations filed by the petitioners in terms of the provisions of the KVS-Scheme.

The petitioners have filed declarations under section 89 of the KVS-Scheme seeking settlement (samadhan) in respect of the outstanding arrears of the aforesaid assessment years. The applications of the petitioners

before the respondent No.2, Settlement Commission, were awaiting settlement process in terms of section 245D(4) and it was only admitted under section 245D(1) of the IT Act. Nothing has been shown to us which would reinforce the view taken by respondent No.1. On the contrary, it is an admitted fact that the appeals in relation to the relevant assessment years in case of both the petitioners are pending and awaiting adjudication. It would be interesting to refer to the provisions of section 95 which provides as to when the Scheme shall not apply in certain cases. Section 95(i) reads as follows: (Relevant part is referred only)

"95. The provisions of this Scheme shall not apply --

(i) in respect of tax arrear under any direct tax enactment --

(a) in case where prosecution for concealment has been instituted on or before the date of filing of the declaration under section 88 under any direct tax enactment in respect of any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment or in respect of a person who has been convicted for concealment or on before the date of filing the declaration;

(b) in a case where an order has been passed by the Settlement Commission under sub-section (4) of section 245D of the Income-tax Act or sub-section (4) of section 22D of Wealth-tax Act, as the case may be, for any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment;

(c) to a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court on the date of filing of declaration or no application for revision is pending before the Commissioner on the date of filing declaration."

It is amply clear from clause (b) of sub-section (i) of section 95 that in a case where an order has been passed by the Settlement Commission under sub-section (4) of

section 245D of the IT Act for any assessment year, to any tax arrear in respect of such assessment year the Scheme shall not apply. Admittedly, the applications pending before the respondent No.2 have not been processed and have not reached to the stage of sub-section (4) of section 245D. Admittedly, the applications of the petitioners are only admitted under section 245D(1). Therefore, mere pendency of applications for settlement before the Settlement Commission could not be said to be a disentitling factor to the petitioners for availing the benefit of KVS Scheme.

After having given an anxious thought to the factual scenario emerging from the record of both the petitions and having analysed and scrutinised the relevant legal proposition enunciated, hereinabove, we are of the opinion that this is a fit case where we should exercise our powers under Article 226 of the Constitution so as to do justice in a dispute like one which is a subject matter of the petitions.

Let us assume that if no relief is granted here to the petitioners, what would happen ? Respondent No.1 who is a competent authority to receive the declaration in relation to KVS-scheme will not process the applications of the petitioners submitted within time and whose appeals are admittedly pending in relation to the same assessment years, and the further action in view of the Commissioner's order cannot be taken on account of the pendency of the applications before respondent No.2, who has rightly declined to permit the petitioners to withdraw the applications for settlement pending before him in the light of the provisions of section 245C(3). The result would be that the petitioners, though, otherwise eligible for seeking the benefits of KVS Scheme would be deprived of that statutory right on account of the wrong view adopted by the respondent No.1, who otherwise, is obliged to process the pending applications under the KVS Scheme. It is, therefore, evident that the respondent No.1, the designated authority, has failed to exercise statutory jurisdiction vested in him in not processing the applications of the petitioners upon a wrong premise and therefore we are satisfied that the prayers made by the petitioners in these two petitions are justified.

In the result, the respondent No.1 is directed to reconsider and pass appropriate order determining the amount payable by the declarants in accordance with the provisions of KVS Scheme and consider to grant

certificate in the prescribed form to the petitioners stating the particulars of tax arrears and the sum payable after such determination towards full and final settlement of tax arrears of tax in both the petitions in accordance with section 90(1) of KVS Scheme 1998, and consider the question of issuance of necessary certificate under section 90(2) of the Scheme. The petitions are, accordingly, allowed. Rule is made absolute. There shall be no order as to costs.

(vjn) .....